

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

MISTI MEWES, individually and as Special
Administrator of the Estate of Keaton Mewes
and CHASE MEWES, individually,

Plaintiffs,

v.

USA, *et al.*,

Defendants.

Case No. 15-cv-01019-JPG-DGW

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiffs’ Motion (Doc. 32) for Leave to File First Amended Complaint and Response to Defendants’ Motion (Doc. 25) to Strike and Dismiss Allegations from Complaint.

Federal Rule of Civil Procedure 15(a)(2) provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” It further states that the Court should “freely give” leave to amend a pleading “when justice so requires.” In this case, Plaintiffs acknowledge that there were “clerical issues” within their complaint as highlighted in Defendants’ motion to dismiss. As such, Plaintiffs are requesting leave to amend their pleadings as response with regard to Headings II and III of the Defendants’ motion to strike and dismiss.

An amended pleading supersedes the prior pleading. *See Wellness Community–National v. Wellness House*, 70 F.3d 46, 49 (7th Cir.1995); *Barnett v. Daley*, 32 F.3d 1196, 1198 (7th Cir.1994). “The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and becomes functus officio.” *Nisbet v. Van Tuyl*, 224 F.2d 66, 71 (7th Cir. 1955).

Therefore, a motion to amend cannot stand as a *partial* response to a motion to dismiss, because the motion to dismiss would become moot upon the filing of the amended complaint. As such, the Court is **GRANTING** Plaintiffs' Motion (Doc. 32) for Leave to File First Amended Complaint and disregarding that portion of the Plaintiffs' Motion with regard to their response to the remaining portions of the Defendants' motion to strike and dismiss. Plaintiffs are **GRANTED 14 days** from the date of this order to file a first amended complaint.

Pursuant to Federal Rules of Civil Procedure 15(a)(3), the Defendants are required to respond to the amended pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Defendants' Motion (Doc. 25) to Strike and Dismiss Allegations from Plaintiffs' Complaint is **DENIED** as moot. However, if the plaintiffs fail to file an amended complaint within the time allotted, the Defendants may motion to reinstate their motion to strike and dismiss.

IT IS SO ORDERED.

DATED: 3/2/2016

s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE